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702-810—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 646

WARREN J. ADAMS, AND TEXAS SCHOOL OF PRACTICAL NURSING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-8) is reported at 347 F. 2d 665.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1965. A petition for rehearing was denied on August 6, 1965. On August 27, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to October 5, 1965, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Mail Fraud Statute, 18 U.S.C. 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

QUESTION PRESENTED

Whether there was sufficient evidence to support the jury's verdict.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on October 31, 1963 of seventeen counts of an eighteen count indictment charging sub-

stantive violations of the mail fraud statute (18 U.S.C. 1341). Petitioner Adams and his co-defendant, David Sidney Miller, were also convicted of conspiring to violate the mail fraud statute, in violation of 18 U.S.C. 371.[1] The corporate petitioner was fined $13,600. David Miller was fined $10,800, and sentenced to imprisonment for eighteen months on each of the first nine counts, to run concurrently; on the remaining counts, he received a five-year suspended sentence (R. 1446–1447).[2] Adams was fined $5,400 and sentenced to imprisonment for nine months on each of the nine counts, to run concurrently, and received a five-year suspended sentence on the remaining counts (R. 1447).

1. Miller was the president and Adams the director of the Texas School of Practical Nursing, a profit-making corporation ostensibly engaged in the training of unlicensed "practical nurses", also known as nurses' aides (R. 1192).[3] Petitioners offered a cor-

[1] A fourth defendant, Miss Lola Opal Christal, was also convicted by the jury of the above charges; however, the district court granted her motion for a judgment of acquittal (R. 1414).

[2] "R." designates the five bound volumes on file with the clerk of the court, containing the transcript of record of trial and sentence, pleadings, and various exhibits. The exhibits appear in a separate bound volume.

[3] The duties of a nurses' aide involve the performance of menial chores, such as bedmaking or taking of temperatures, usually at hospitals or nursing homes (R. 341, 815). Only six (the so-called "mandatory") States require that nurses' aides be licensed. The "permissive" States, including Texas, allow unlicensed nurses' aides to work so long as they do not represent in any way that they have a State license (Gov't Exh. 44, R. 399–403).

respondence course for $153.50. For an additional sum of $62.50 (less a travel rebate) the student could participate in a two-week supplemental course at the school in Dallas (R. 990).

Petitioners' method of operation was to publish classified newspaper advertisements, inviting inquiries by mail (R. 13, 45, 51, 58, 73, 94, 156, 184). The advertisement was headed "Nurses Needed" and the text stated that the school offered full- or part-time training as practical nurses. It was stated that a high school education was not necessary. The advertisement implied that a graduate of the school would receive "[h]igh earnings." (See Gov't Exh. 18a.)

Inquiries were answered by a letter enclosing information pamphlets (R. 13, 95, 215, Gov't Exhs. 1, 1A, 7, 7A), advising the inquirer of the demand for nurses, the benefits to be received from the completion of petitioners' course, the availability of a free employment service, and the forthcoming visit of a "Student Counsellor." The prospect was told that upon completion of the course she would receive a diploma designating her as a "Graduate Practical Nurse (Gov't Exhs. 1, 7).

The "Student Counsellor" who contacted the prospective student was nothing more than a commission salesman (R. 673–684). He had no training in practical nursing (R. 1128). He received a $30 to $40 commission for each course sold (R. 680, 682). If sales were slow, he might receive a letter from Adams urging greater "production" (R. 1110–1111, Gov't Exh. 51).

The salesmen left the impression with many students that graduation from the school meant that a person was a licensed nurse or could take the State examination to become one (R. 16, 27, 87, 156, 186, 248, 268, 1163, Gov't Exhs. 6B, 6E, 27, Def. Exh. 63). Some salesmen neglected to discuss licensing at all (R. 98, 216). Students were also told that they would receive hospital training (R. 52, 54, 75, 99–100, 145, 268) and that after graduation they could get a job in any hospital (R. 25, 31, 52, 145, 248) and earn from $8 to $14 a day (R. 16, 74, 87, 98, 113, 239). Another enticement was the offer of a free employment service, which guaranteed the graduate a job (R. 58, 74, 75, 82, 158).

Once the student embarked upon her studies, she had no supervision. Her "examinations" were not proctored. On the rare occasion when she did poorly, her test paper would be returned with the right answers underlined in red (Gov't Exhs. 32, 32A). She would be advised to re-study her lesson and submit a second copy of the same test paper (R. 248–249). The school had no educational qualifications for enrollment (Gov't. Exh. 18A).

James A. White was hired by the school in January 1957 to serve as the "student adviser" (R. 494). This title meant only that his job was to answer all routine correspondence (Gov't Exhs. 6C, 10, 17H, 21, 22, 32F, 53). Adams composed a book of form letters upon which White was to base his replies (R. 498). Two of the forms dealt with licensing; one, for correspondents in Texas; the other, for all other

correspondents (R. 499). Adams ordered White not to deviate from the forms (R. 504). White answered 25 to 40 letters per day, most of them complaints (R. 502). If a complaint was received from a student residing in a State which required all practical nurses to be licensed, White was instructed to be evasive in his reply (R. 562).

Letters of complaint were answered by adapting paragraphs of one or more form letters to fit the circumstances (R. 504). If White could not provide an answer from the form letters, he turned the complaint over to Adams (R. 504). If a complaint charged misrepresentations by a salesman, White was instructed to inform the student that the salesman had been in the school's employ for many years and that the school had not received previous complaints against him (R. 506). If this reply was not true, and often it was not, White passed the letter on to Adams (R. 506). Demands for refunds were paid only after exhaustive dilatory correspondence failed to dissuade the students (R. 507–509). White terminated his employment in November 1962 (R. 494).

The course of study and the benefits obtainable from petitioners' school were not as represented to the students. The Texas School of Practical Nursing occupied the second story of a building in Dallas. The first floor was occupied by an optical company, which had an outdoor sign. This sign was deleted from the picture of the building which petitioners used on some of their stationery (R. 500), giving the reader the impression that the school occupied

the entire building. The school employed some registered nurses as teachers. Its faculty list also included the names of two medical doctors who lectured there on rare occasion but who had never consented to be, or knew that they were, represented by petitioners as being members of the faculty (R. 501, 333–335, 447). All correspondents who paid their fees in full passed the course (R. 733, 958) and were granted a diploma (Gov't Exh. 14C). Students who elected to come to Dallas for the advertised two-week "hospital" course spent that time at the school practicing on dummy patients or viewing movies or lectures by milk salesmen (R. 76, 523, 820). In addition, they were treated to a tour of the Dallas Health Museum, a free public building (R. 895, 911–912). They received no training in hospitals (R. 75, 1164). Petitioners' school was never accredited, and was ineligible for accreditation (R. 345–347, 408, Gov't Exh. 49). The advertised "free employment service" consisted of a form letter issued to the student who passed the course, praising her as industrious, dependable and conscientious, and setting forth her "scholastic average" (Gov't Exhs. 12, 14B). Listed on the back of the letter were a number of hospitals or nursing homes, which she was advised to contact. Students who sought employment at any of these places were usually rejected (R. 60, 80; Def. Exh. 63). Concerned about the sham employment service, White suggested to Adams and Miller that they create a special department whose sole duties would involve the placement of students. Miller and Adams re-

jected the idea, saying that "the school was not in the employment business, had no intentions of getting in it, and that the problems of graduates were no concern of theirs." (R. 523–524.) When students who attended the two-week course at the school inquired about prior representations made to them that graduation would entitle them to a license, Adams replied that they must first go to Austin to appear before a board, but that the correspondence course would make them eligible to obtain the license (R. 78, 110, 1156). One nurse who had taught at the school in 1956, 1957, and 1962 estimated that in an average class of from seventeen to twenty students, three or four complained of prior misrepresentations made regarding eligibility to obtain a license as a result of their studies at petitioners' school (R. 1156, 1157).

The experiences of Mrs. Hayden Goss, Mrs. Helen Buchta, and Mrs. Lulu May Robertson with petitioners' correspondence course were typical. Mrs. Goss, a waitress, responded by mail to petitioners' classified advertisement, and on January 14, 1958, was sent petitioners' paraphernalia (Gov't Exhs. 1, 1A). A salesman then called on her. He represented that if she took the course she would become a licensed practical nurse and earn as much as $14 per day (R. 16). The salesman asserted that the "license" was recognized in Texas and Canada (R. 17). In fact, the State of Texas licenses only registered nurses and vocational nurses, and never certified the Texas School of Practical Nursing as qualified to license nurses (R. 408), because, among other reasons, the school

provided no training with live patients and the educational level of its students was generally inadequate (R. 406, 435). Mrs. Goss commenced the correspondence course, and, despite a seventh-grade education, was able to pass her home study examinations with marks of 95 to 100 (R. 20). Prior to completing the entire course, Mrs. Goss discovered that the diploma she would receive from the petitioners was not recognized by the State (R. 36). She decided not to continue the course, and received letters from petitioner regarding her credit rating (Gov't Exhs. 2, 3, 4, 5).

The salesman sent to follow up the inquiry of Mrs. Helen Buchta, who had a fifth-grade education (R. 220), advised her that upon completion of the correspondence course she could work in any hospital in Texas (R. 216). Her letter to the school inquiring about licensing was never answered. She finished the course with average grades above 95 and received a diploma signed by petitioner Adams and Doctor David Miller (Gov't Exh. 9C).[4] Her applications for employment in hospitals were rejected (R. 220, 233).

Louisiana is one of a half-dozen States which require a license for practical nurses. Mrs. Lula May Robertson, a house maid who resided in Louisiana, was told by a school salesman that the Texas School was accredited (R. 238, 241) and that she would be able to work in Louisiana after completing the cor-

[4] In June 1957, the Rutherford Metropolitan Technical Institute of Business, Dallas, Texas, had awarded Miller an honorary doctor of business administration degree (R. 390). The award was the idea of an advertising company which handled the Texas School of Practical Nursing's account (R. 391).

respondence course (R. 238). Despite a fifth-grade education, she received a grade of 97 on her final examination, and her overall average was 92 (R. 240; Gov't Exh. 25). After "graduating", Mrs. Robertson was still not qualified under Louisiana law to obtain a practical nurse's license. She wrote one letter to petitioners, inquiring about licensing, and received no reply (R. 240). At the time of trial, Mrs. Robertson was still working as a house maid, earning $5 per day (R. 239).

2. At trial, Adams denied any intent to deceive (R. 1043, 1123). He asserted that salesmen were often warned about misrepresenting the course (R. 1043–1044) and that some were discharged if they continued to do so. He described the willingness of the school to cooperate with a Post Office and a Federal Trade Commission investigation (R. 1050–1052, 1105–1107). He admitted ordering White to use a form-letter reply to inquiries concerning State licenses (*e.g.*, Gov't Exhs. 27, 28), but felt that the forms adequately answered the complaints (R. 1123). Although Adams was the school director and worked at the Dallas location, he denied any knowledge of the many dissatisfied students (R. 1056).

ARGUMENT

Although phrased in different ways, the entire thrust of the petition for certiorari is to contest the sufficiency of the evidence to sustain petitioners' convictions. This is not a question warranting further review.

1. The evidence showed that petitioners preyed upon the uneducated by luring them with promises of professional status and well paying jobs upon completion of a correspondence course in practical nursing (Gov't Exh. 18A). The first literature received by the unsuspecting prospect included a touched-up picture of the school building in Dallas and represented that the graduate would be qualified in a highly respected occupational specialty recognized by hospitals and other potential employers (Gov't Exhs. 7A, 17A). Those who completed the course were described as "Graduate Practical Nurses." In fact, the title is without significance in the nursing profession (R. 338–342, Gov't Exh. 44). Petitioners' school is unaccredited and wholly ineligible for any form of accreditation (R. 408, 436; Gov't Exh. 49).

Misrepresentations and half-truths were central to petitioners' scheme. The record contains many examples of prospective students inquiring about whether they would be eligible for a State license upon taking petitioners' course and of salesmen misrepresenting that students would be eligible. If the question did not arise until after the student had begun her studies, the school replied, if at all, by a form letter. The letter did not contain a direct and clear "No." Nor did it explain the State requirements for obtaining a license. Instead, it ambiguously advised that a license was not necessary for a practical nurse (Gov't. Exh. 17D, R. 499, 511–512, 1122–1123). See *Beasley* v. *United States*, 327 F. 2d 566 (C.A. 10), certiorari denied, 377 U.S. 944. The

ambiguity was intentional (R. 504). Misrepresentations were also made that the employment service would obtain a job for the graduates, that hospital training would be provided, and that the graduates would be in great demand as highly trained and well qualified nurses eligible for work in hospitals. Furthermore, a recitation that petitioners' school had a national affiliation was continued long after the national organization of schools of practical nursing was disbanded (R. 305–306). On this evidence the jury had the right to conclude that petitioners were knowingly engaged in a scheme to defraud. See *Babson* v. *United States*, 330 F. 2d 662 (C.A. 9), certiorari denied, 377 U.S. 993.

2. Petitioners' claim that they modified their literature in order to adhere to the requirements of one federal law (Federal Trade Commission Act, 15 U.S.C. 55a) only to be indicted under a different federal law (the mail fraud statute) is without merit. In 1954, the FTC requested that petitioners submit representative copies of their advertisements for a six-month period (R. 1001). Petitioners sent not only the requested materials, but also copies of letters received from satisfied students; they did not, however, send any uncomplimentary letters (R. 1108), such as those which claimed misrepresentations by salesmen (R. 1107). Only once, in 1954 or 1955, did an investigator visit petitioner; all other communications between petitioner and the FTC were by mail (R. 1106). At the time of trial, the Federal Trade Commission had not rendered an adjudication in peti-

tioners' case, but was still in the process of investigation (R. 997).

Prior to that time the Commission had stated, in *National Institute of Practical Nursing*, 48 F.T.C. 1253, 1261:

> The designation of "practical nurse" when applied to one who acquired it by attending a school means, in its full sense, one who has satisfactorily completed a full time, nine months' course of instruction which includes a substantial amount of time in a hospital or other institution for the care of the sick, with work under supervision at the bedside of patients therein. This course of instruction falls far short of such a curriculum. The use of respondents of the term "complete" to describe their course in practical nursing is misleading, as is their designation of graduates of the school as "practical nurses," "trained practical nurses," and "graduate practical nurses."

In the above cited case and in three others, *Washington Institute of Practical Nursing*, 51 F.T.C. 301; *Wayne School, Inc.*, 53 F.T.C. 428; and *Post Graduate Hospital School of Nursing, Inc.*, 53 F.T.C. 432, activities similar to those carried on by petitioners herein were declared unlawful. In *W. L. Schulze, T/A Chicago School of Nursing*, 54 F.T.C. 1754, relied upon by petitioners, the respondents had changed their terminology from "practical nurse" to "auxiliary nurse" prior to the issuance of the complaint. The government conceded that the respondents were not representing that their course qualified graduates for licenses, and in fact "specifically advised all applicants that the course did not so qualify graduates" (54

F.T.C. at 1759); no such disclaimer was made here. At all events, testimony by Adams concerning the FTC's investigation was introduced at trial for whatever merit it might have on the issue of specific intent to defraud, and the court rendered a proper and adequate instruction which petitioners do not challenge (R. 1000). This testimony was but a small part of the overall evidence on intent which the jury had before it (see the court's instructions, R. 1374).

3. Petitioners' reliance upon *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94,[1] misconceives the charges in this case. The government's case was not based on any theory that practical nursing correspondence schools are worthless, but on the theory that petitioners knowingly misrepresented the nature of their training and its utility in obtaining employment. Evidence that, in the opinion of experts, practical nursing could not be taught by correspondence was obviously relevant to a consideration both of the validity of petitioners' representations that persons who completed the course would be highly trained and well qualified and to the issue of intent.

Petitioners' claim that this federal prosecution under the mail fraud statute was a device used to establish minimum standards for the training of practical nurses in the State of Texas is likewise specious. This prosecution did not have the purpose

[1] This Court there reversed a conviction on the ground that the practice of faith healing alleged to be illegal was subject to honest differences of opinion, and there existed no standard of absolute truth by which to prove the appellants' assertions false and fraudulent.

or effect of outlawing or federally regulating practical nursing schools. Petitioners are being punished for having used the United States mails to fraudulently misrepresent to "the gullible, the ignorant and the over-credulous as well as the more skeptical" the training that they offered. See *United States* v. *Sylvanus,* 192 F. 2d 96, 105 (C.A. 7), certiorari denied, 342 U.S. 943.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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